No. 83-88

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MCDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

NORTHROP CORPORATION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

This reply addresses matters raised by Northrop in its Brief in Opposition ("Opposition"). While Northrop contends there are genuine issues of material fact, it identifies *none* that are necessary to decide the Questions Presented in McDonnell's Petition for Writ of Certiorari ("Petition"). Those Questions Presented are now ripe for determination and are not dependent upon the resolution of any disputed material facts.

REPLY

A. Northrop Seeks Relief To Foreclose Competition Between Northrop And McDonnell, Not To Foster It.

Northrop claims that McDonnell has "mischaracterized" the *nature* of the relationship established by the 1975 Basic Agree-

ment, which Northrop now euphemistically calls "a recriprocal assignment of prime contractor responsibilities."[1] (Opposition, p. 13). Northrop contends that, as such, it is not a blatant *per se* violation of the antitrust laws, but instead is pro-competitive.

Northrop cannot, however, deny the immutable fact of this litigation, the claims it has made or the relief it has sought based on its construction of the Basic Agreement. The euphemistic labelling cannot hide the unambiguous and unequivocal market division Northrop's Amended Complaint seeks to enforce.

Northrop seeks to preclude McDonnell from offering to sell, selling or producing:

(a) *any* configuration of the F-18 (whether "land-based" or "carrier-suitable") for the United States Air Force, claiming that customer as its sole domain;[2] and

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[1] Northrop's present view of the Basic Agreement as a 60/40 "reciprocal" assignment of prime contract and subcontract responsibilities is contrary to its position in the District Court. There, one of its senior officers testified in his deposition:

> McDonnell had no existing right [under the Basic Agreement to share in prime contracts obtained by Northrop]. . . . Northrop did have a right [to share in McDonnell's contracts] which is clearly stated in the Basic Agreement. (Gonzalez Dep. at p. 354.)

[2] As a Northrop Vice President succinctly testified in his deposition:

> [McDonnell's Counsel]: *There was an agreement that those customers would be divided, the Air Force—*
>
> [Northrop's Vice President]: — *Along the lines of the Teaming Agreement, that is what I recall was the statement or thereabouts.*
>
> [McDonnell's Counsel]: . . . *[T]hat meant Northrop would have the exclusive right to sell the F-18 to the Air Force, and that McDonnell would have the exclusive right to sell the F-18 to the Navy?*
>
> [Northrop's Vice President]: *Yes.* (J. Jones Dep. at 417.)

(b) *any* non-carrier suitable F-18 or any F-18 which differs from the Navy configuration.[3]

This market division is no previously "unexamined business practice" which requires rule-of-reason analysis. While the Ninth Circuit panel may have been impressed by Northrop's new label, this Court should recognize that it is the same old wine: a *per se* illegal effort by Northrop to prevent McDonnell from selling F-18's to the same customers to which Northrop seeks to sell them.

Northrop vainly attempts to justify this market division by contending that it was necessary to create competition where none previously existed, and that it now enables Northrop and McDonnell to compete "head-to-head" in the sale of F-18's. There are several patent untruths in this argument.

First, the Basic Agreement as Northrop construes it does not foster competition.[4] No "in-depth analysis of [its] economic purpose or effect" (Opposition, p. 15) is required. Under it, McDonnell could not sell F-18's to the Air Force, and Northrop could not sell F-18's to the Navy; and McDonnell could not sell "land-based" F-18's, and Northrop could not sell "carrier-suitable" F-18's. (Opposition, pp. 5-6.) Thus, Northrop's construction of the Basic Agreement is one that "would always or almost always tend to restrict competition . . . ." *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S.

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[3] Northrop believed such limitations on configurations would assure it the foreign market, since, as Northrop stated in a Jan. 5, 1979 internal memorandum, "it is a practical impossibility for any foreign sale to be made on the basis of the exact configuration being purchased by the Navy." As a Northrop Vice President stated in a Jan. 3, 1978 internal memorandum to Northrop's Chairman: "If [McDonnell] was forced to limit itself strictly to what the Navy has under Contract we [Northrop] would have a distinct advantage."

[4] Moreover, Northrop's pro-competitive justification arguments are irrelevant to an evaluation of a *per se* illegal practice. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 351 (1982); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

1, 19-20 (1979). It can neither increase economic efficiency nor render markets more competitive. It is, in the words of this Court, "manifestly anticompetitive," *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977), and without "a purpose [other than] stifling . . . competition." *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963).

Second, Northrop did not *create* the business opportunity for developing and selling F-18's—the Government did. As Northrop acknowledges in its Opposition, it is the Government which determined whether a plane would be procured and who could compete to provide it. (Opposition, pp. 4, 14.)

Third, by the time of the June 27, 1975 Basic Agreement, no agreement to divide the market between McDonnell and Northrop was necessary to bring the F-18 to market. While Northrop had lost the ACF competition to General Dynamics, the Government had selected McDonnell to develop the F-18.[5]

In an attempt to justify its obvious *per se* illegal market division, Northrop asserts that the parties' agreements are licenses, with reasonable use limitations. The agreements, on their faces, are not licenses; they are teaming agreements entered into under DAR 4-117 as Northrop now acknowledges throughout its Opposition.

Moreover, as Northrop admits, the Government purchased "unlimited rights" in all of the data and technology surrounding the YF-17 and F-18 and, as found by *both* the District Court and Ninth Circuit, expressly authorized McDonnell to freely

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[5] Northrop was pursuing foreign sales of a YF-17 derivative designed for land-based operations. It has now been disclosed that it was Northrop's purpose in the Basic Agreement to preclude the F-18 from competing with its YF-17 land-based derivative. As Northrop's F-17 Deputy Program Manager wrote in an internal memorandum dated April 2, 1975: "Northrop-Navy v. MCAIR-Navy in the same market is unacceptable . . . . Since, what is good for MCAIR and the Navy may not be in Northrop's best interest, some guidelines are required . . . ."

use it. (Finding of Fact 40, App. p. 92a; 705 F.2d at 1036.)[6] Even if, as Northrop contends, the agreements were residual rights licenses with use limitations, they could not justify the relief sought by Northrop, *i.e.*, to prevent McDonnell from producing and selling any F-18 aircraft which the Government, in the exercise of its "unlimited rights," wants to procure for use by its Air Force or any country to which the Government elects to sell F-18's.

B. Northrop's Claims And Requested Relief Restrict The Government's Unlimited Rights In The F-18 Data And Make The Government An Indispensable Party To This Dispute.

The issue is not, as Northrop disingenuously implies, whether a purchaser of a product is an indispensable party in a suit between suppliers. McDonnell does not contend that simply because the Government is a purchaser of F-18's it is an indispensable party. Rather, *it is the unprecedented claims of Northrop in this action* which make the Government indispensable in this case. *For the first time*, a prime contractor (Northrop) seeks to restrict the Government's use of its "unlimited rights" in the data and technology of an advanced aircraft weapon system (the F-18) by attempting to enjoin or penalize another prime contractor (McDonnell) which relies on the Government's "unlimited rights" in connection with a Government procurement.[7]

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[6] Further, Northrop itself alleges that it provided all assertedly "proprietary" YF-17 data, technology, and know-how to McDonnell under the 1974 Teaming Agreement and prior to the 1975 Basic Agreement. (Amended Complaint, para. 17, App. p. 150a.) On its face, the Teaming Agreement contains no use restrictions (App. pp. 132a-133a). Under Northrop's F-17 proposal prime contract, the Government paid Northrop for the provision of such information directly to McDonnell for its NACF (F-18) proposal. Northrop cannot now convert the subsequent Basic Agreement into a retroactive license of disclosures made without restriction and for which it was paid by the Government.

[7] Thus, the cases Northrop cites at p. 17 of its Opposition are wholly inapposite. Indeed, none of the cases cited in the first paragraph on

The principal reasons why the Government obtains unlimited rights in data are to carry out its "policies on competitive procurement, subcontracting and component breakout . . ." (DAR 4-117 and 9-504(a)) and "to foster technological progress through wide dissemination of the new and useful information derived from [research and development] work and where practicable to provide competitive opportunities for supplying the new products and utilizing the new processes." (DAR 9-202.1(c) and 9-202.2(b)(2).)[5] In fact, DAR 4-117, which Northrop acknowledges governs teaming relationships (Opposition, p. 4 n.2), expressly protects the Government's exercise of its unlimited rights and proscribes the market division and other restrictions Northrop now seeks to impose through its construction of the Basic Agreement.

Northrop misleadingly asserts that it "has only requested relief that would prohibit MDC from committing predatory acts prior to receiving an order for F-18 aircraft from a customer" and has requested no relief which would interfere with any Government procurement or the Government's rights (Opposition, p. 19). Its assertion is belied by a simple reading of its Amended Complaint. (See Petition, p. 3.) Contrary to Northrop's assertions, the granting of such relief would immediately prejudice the Government's rights. Since Northrop is attempting to preempt a Government exercise of its rights, the possi-

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that page analyzed the issue of indispensability under Rule 19. None of the cases even remotely involved any claims such as Northrop makes here which would restrict the Government's unlimited rights in an advanced aircraft weapons system.

[5] Contrary to Northrop's incorrect representation that prior to the Basic Agreement all military aircraft have been made available to customers only on a sole source basis (Opposition, p. 6), the Government has procured aircraft from dual and multiple sources (e.g., the B-17 from Boeing Company, Douglas Aircraft Company and Lockheed Corporation; the B-24 from Douglas Aircraft and Consolidated Vultee Corporation; and the B-47 from Boeing, Lockheed and Douglas Aircraft).

bility that the adverse consequences of such prejudice may be prospective is irrelevant.[9]

C. Northrop's So-Called "Private" Dispute Inextricably Involves The Political Question And Act-Of-State Doctrines Which Render The Action Non-Justiciable.

1. Political Question Doctrine

Northrop claims that the adjudication of this dispute would not require the court "to become involved in sensitive political issues" (Opposition, p. 22), and that the District Court based its decision on the "mistaken" belief that Northrop was seeking a declaration stating from whom the Government could procure the F-18. Northrop is guilty of misstatement on both counts. In the District Court it admitted that sensitive political issues are involved,[10] and its own Amended Complaint is irrefutable evidence of the declarations and other relief it is seeking.

That relief would require that the Government procure F-18's and make them available to foreign governments only in accordance with the market division, including customer allocations, which Northrop seeks to establish in this action. Thus, the Judiciary, not the Executive and Legislative Branches, would be making military procurement decisions affecting national defense and foreign policy which are non-

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[9] As Northrop stated in a hearing before the District Court:

> [The Court]: Suppose the government came to McDonnell and said we want you to build this airplane in this configuration which is land-based. Do they have a right to do it?
>
> [Northrop's counsel]: I don't believe they have a right to do it.
>
> [The Court]: Aren't they the indispensable party to this litigation?
>
> [Northrop's counsel]: They would be in that event, but that has not happened . . . .

[10] As Northrop told the District Court: "We believe as to the United States they will have an interest in this case . . . There is more involved than just money [in this litigation]. I think national security . . . is an interest in this case."

justiciable under the political question doctrine enunciated by this Court in *Baker* v. *Carr*, 369 U.S. 186 (1962), and *Gilligan* v. *Morgan*, 413 U.S. 1 (1973).

2. Act-Of-State Doctrine

In its Opposition, Northrop fails to address the conflict between the Second Circuit decision in *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (1977) and the Ninth Circuit's decision in the present case. (See Petition, p. 20-22.) Conspicuously, it fails to mention *Hunt*, which would bar the inquiries necessary to adjudicate the present action.

Northrop argues that the act-of-state doctrine applies only when it would be necessary for a court to determine the "validity of any act of a foreign government," as contrasted with the motivation behind it. This is erroneous. As most recently held by the Ninth Circuit, the case law "does not foreclose application of the act-of-state doctrine to cases where motivation but not validity must be scrutinized." *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir. 1983).

It is clear that the adjudication of this case, as pleaded, would necessarily require inquiry into the reasons, motivation and policies underlying the acts of foreign governments. In order to prove the claims which it actually made in its Amended Complaint, Northrop would have to show that McDonnell's alleged acts were the proximate cause of decisions of foreign governments not to purchase F-18's from Northrop.

The Ninth Circuit attempts to avoid the act-of-state doctrine by stating that "The claims relating to the increased costs associated with duplicating technology that McDonnell was allegedly contractually obligated to furnish Northrop will not require the court to inquire into any foreign procurement decisions . . . ." (705 F.2d at 1048; Opposition, p. 24.) Northrop made *no such allegation* in its Amended Complaint, either expressly or impliedly, and the Ninth Circuit's and Northrop's reliance on such a non-existent claim is unwarranted.

D. The Government's Overriding Control Of The F-18 Advanced Aircraft Weapons System Precludes A Dangerous Probability Of Success Of Monopolization.

In its Opposition, Northrop mischaracterizes the nature of McDonnell's argument by asserting that McDonnell seeks a sweeping immunity from the antitrust laws for all contractors selling to the Government. This assertion is incorrect.

McDonnell has not contended that the defense industry is exempted from antitrust scrutiny.[11] McDonnell maintains only that, by virtue of the absolute control that the Government exercises over all aspects of the production and sale of the F-18 advanced aircraft weapons system,[12] McDonnell cannot possess the market power required for a finding of a dangerous

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[11] "Exemptions should not be confused with defenses . . . . In any antitrust proceeding, the defendant may avoid liability in one of three ways. First, he may rely on the plaintiff's failure to establish all the requisite jurisdictional and substantive elements of the offense charged. Second, he may successfully interpose a statutory or other defense. Third, he may demonstrate that the particular group, industry, or business of which he is a member is exempt. All too often, courts and commentators fail to distinguish exemptions from the first two escape routes." 2 von Kalinowski, Antitrust Laws and Trade Regulation, § 7.01[1][b] (Desk ed. 1983).

[12] Northrop contends that although the Government is the sole domestic buyer, it does not determine the identity or number of suppliers and does not exercise control over foreign purchases of U.S. advanced aircraft weapons systems. Northrop is mistaken. As Northrop's Opposition acknowledges, the Government "limited its ACF competition to Northrop and GD." (Opposition, p. 11). Moreover, the Government controls who can sell what weapon systems to foreign customers. For example, as in PD-13 (see Petition, p. 8), the Government has recently promulgated a policy that it will permit only the Northrop F-20 and GD F-16/J79 "export fighters" to be sold to the Gulf States of Bahrain, Kuwait and United Arab Emirates. *Aviation Week & Space Technology*, p. 13, July 25, 1983.

probability of success of monopolization.[13] Thus, a necessary element of attempted monopolization is lacking.

Northrop also contends the Ninth Circuit panel did not rely on an inference of dangerous probability of successful monopolization in finding that summary judgment was inappropriate on the Section 2 claim. It is clear, however, that its finding of a *prima facie* dangerous probability of success could be supportable only if monopoly power was inferred, since the court cited no evidence of the existence of such power.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to decide the Questions Presented therein. Those Questions should be decided now because of their significance to the established law of *per se* offenses most recently reaffirmed in *Arizona* v. *Maricopa County Medical Society* and their exceptional importance to national defense and foreign policy.

Respectfully submitted,

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[13] None of the diverse cases cited by Northrop in its Opposition at p. 26 n.23 involved the factors which control the distinct issue present here.